

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X		
YOLANDA SANTIAGO,	:	
	:	
Plaintiff,	:	18-CV-9214 (VEC)
	:	
-against-	:	<u>ORDER ADOPTING</u>
	:	<u>REPORT &</u>
COMMISSIONER OF SOCIAL SECURITY,	:	<u>RECOMMENDATION</u>
	:	
Defendant.	:	
-----X		

VALERIE CAPRONI, United States District Judge:

WHEREAS on October 9, 2018, pursuant to § 205(g) of the Social Security Act, 42 U.S.C. § 405(g), Plaintiff Yolanda Santiago filed a complaint against the Commissioner of Social Security, seeking review of the Social Security Administration's denial of her application for disability insurance benefits, Dkt. 2;

WHEREAS on December 7, 2018, Plaintiff entered into a retainer agreement with Daniel Berger ("Counsel"), pursuant to which she agreed to pay Counsel 25% of her past due benefits for handling the case if her lawsuit succeeded, Dkt. 24-1;

WHEREAS on July 18, 2019, the Undersigned remanded the case for further administrative proceedings consistent with the parties' stipulation, Dkt. 19;

WHEREAS on August 9, 2019, the Undersigned awarded Counsel \$6,050.00 in attorneys' fees pursuant to the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412, Dkt. 22;

WHEREAS on May 25, 2022, after the Appeals Council remanded the case for further administrative proceedings, Administrative Law Judge Selwyn S.C. Walters found that Plaintiff has been disabled since April 1, 2015, Berger Affirmation, Dkt. 24, ¶ 5;

WHEREAS on June 11, 2022, the Social Security Administration notified Counsel that it withheld 25% of Plaintiff's past due benefits — \$39,944.00 — in the event it needs to pay Counsel's fee, Dkt. 24-3;

WHEREAS on June 17, 2022, Plaintiff moved for an order awarding \$39,944.00 in attorneys' fees under 42 U.S.C. § 406(b), Dkt. 23; Dkt. 25 at 2.

WHEREAS Counsel stated that he would remit the \$6,050.00 he received under the EAJA to Plaintiff if the motion were granted, Dkt. 25, at 3–4;

WHEREAS on October 3, 2022, the Court referred this matter to Magistrate Judge Cott, Dkt. 27;

WHEREAS on November 2, 2022, Judge Cott entered a Report and Recommendation ("R&R"), recommending that Plaintiff's motion be granted, Dkt. 28;

WHEREAS in the R&R, Judge Cott notified the parties that, pursuant to 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b), they had fourteen days to file written objections to the R&R's findings, *id.* at 7–8;

WHEREAS Judge Cott further noted that failure to file objections would result in both the waiver of objections and the preclusion of appellate review, *id.* at 8;

WHEREAS no objections were filed by either party;

WHEREAS in reviewing an R&R, a district court "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge," 28 U.S.C. § 636(b)(1)(C);

WHEREAS when, as here, no party objects to the R&R, the Court may accept the R&R provided that "there is no clear error on the face of the record," *Heredia v. Doe*, 473 F. Supp. 2d

462, 463 (S.D.N.Y. 2007) (quoting *Nelson v. Smith*, 618 F. Supp. 1186, 1189 (S.D.N.Y. 1985));
see also Fed. R. Civ. P. 72(b) advisory committee's note;

WHEREAS an error is clear when the reviewing court is left with a "definite and firm conviction that a mistake has been committed," *see Cosme v. Henderson*, 287 F.3d 152, 158 (2d Cir. 2002) (quoting *McAllister v. United States*, 348 U.S. 19, 20 (1954)); and

WHEREAS careful review of the R&R reveals that there is no clear error;

IT IS HEREBY ORDERED that the R&R is adopted in full, Plaintiff's motion is GRANTED, and attorneys' fees are awarded in the amount of \$39,944.00.


IT IS FURTHER ORDERED that, for the reasons discussed in the R&R, Counsel must remit the \$6,050.00 EAJA fee award to Plaintiff.

IT IS FURTHER ORDERED that because the R&R gave the parties adequate warning, *see* R&R, Dkt. 28 at 7–8, the failure to file any objections to the R&R precludes appellate review of this decision. *See Mario v. P & C Food Mkts., Inc.*, 313 F.3d 758, 766 (2d Cir. 2002) ("Where parties receive clear notice of the consequences, failure timely to object to a magistrate's report and recommendation operates as a waiver of further judicial review of the magistrate's decision.").

The Clerk of Court is respectfully directed to terminate the open motion at Docket 23.

SO ORDERED.

Date: December 1, 2022
New York, New York


VALERIE CAPRONI
United States District Judge